THE
MADRAS LAW JOURNAL.

VOL.] JANUARY, 1933. [LXIV.

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ON TRACING

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In equity, if one person held in a fiduciary capacity, goods or chattels belonging to another, that other could not only recover back the identical goods or chattels at any time, if they should be in existence, but could also follow the same into any transformations they might have undergone and seize such transformed things. But this was subject to the rule that if the trustee (used in a wide sense) had disposed of the goods and chattels and recovered their value in money, there was an end to the right of the beneficiary. The money became part of the general assets of the trustee, no longer available to the beneficiary. Thus where a factor to whom a merchant had consigned goods for sale, sold the goods, recovered the price and died with debts of a higher nature, the money became part of the general assets. But if the factor re-invested the price in other goods, those other goods were available to the merchant. The exception to the rule of following, in the case of money, was founded on the principle that money had no earmark. This was decided as early as 1710 in *Whitecomb* v. *Jacob*[1] and in *Scott* v. *Surman*.[2]

The next stage was to consider whether money if invested in land, could be followed. Some cases declined to give relief because money had no earmark, *e.g.*, *Deg* v. *Deg*.[3] But others did give relief, and the positions to be answered therein were:—

(1) Whether in view of the Statute of Frauds which prohibited creation of trusts by parol, a trust in respect of land could be declared by the court without an instrument in writing as required by the Statute, and

(2) The question of the proof of the investment.

1. (1710) 1 Salk. 160: 91 E. R. 149.
2. (1742) Willes 400: 125 E. R. 1235-1237.
3. (1727) 2 P. Wms. 412: 24 E. R. 791.

The former question was answered by the argument that if the consideration for the investment was shown to have flowed from other funds than those of the person in whose name the land stood, that fact could be proved, with the consequence that there was a resulting trust which avoided the Statute of Frauds. This was the problem solved in *Lane* v. *Deighton*[4] and in *Lench* v. *Lench*.[5] Sir William Grant M. R. in the latter case said: "Whatever doubts might have been formerly entertained on the subject, it is now settled that money may be followed into the land."

Then we come to the important case of *Taylor* v. *Plumer*.[6] There a broker who was entrusted with money to buy Exchequer Bills, purchased American stock and bullion with the money, with intent to abscond therewith, but being taken before quitting England, he surrendered the securities and bullion. On the same day the broker became bankrupt, and the question was whether the principal was entitled to the American stock and bullion or whether they formed part of the general assets. The argument for the Assignee in Bankruptcy shows that the point taken on his behalf was that the right to follow existed only in cases where the transformation of the trust property was in pursuance of the trust, provided of course that such property is capable of being ascertained. The distinction was taken that where the property had been tortiously acquired by the agent in fraud of the trust, there the lien of the principal was at an end, and it was said "that the principal cannot for his own private advantage and to the prejudice of all the other creditors aver what has been done in fraud of his trust, to have been done in execution of it." (Cf. *Waite* v. *Whorwood*.[7]) The reason for thus limiting the rule was stated in the form that as the principal would not be bound to take the property if purchased by the agent in violation of the trust, so it is only so long as he is bound to accept it, that he can reasonably call it his own. Thus while the right to follow and trace was well understood to be dependent on "title", it was thought that such title could not be averred where there was a breach of trust. The argument *contra* relied on the cases of *Whitecomb* v. *Jacob*[1] and *Lane* v. *Deighton*[4] and the distinction was stated to be, not whether the property in the hands of the factor was acquired in pursuance of the trust or not, but whether it can be specifically distinguished

1. (1710) 1 Salk. 160: 91 E. R. 149.
4. (1762) Amb. 409: 27 E. R. 274
5. (1805) 10 Ves. Jun. 516: 32 E. R. 945.
6. (1815) 3 M. & S. 562: 105 E. R. 721.
7. (1741) 2 Atk. 159: 26 E. R. 500.

and ascertained to belong to the principal, and not to the bankrupt, that the reason why money cannot be followed was, in this sense, not because it had no earmark, but because, on account of the currency of it, it cannot be recovered after it had so passed into currency, and that as regards tortious acquisitions it was always open to the beneficiary to waive the wrong and treat the other as receiver for his own use. Lord Ellenborough C.J. put down the test as the capacity of being identified and distinguished from all other property. He added that an abuse of trust can confer no rights on the party abusing it nor on those claiming in priority with him; that the product or substitute of the original thing still followed the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment failed, which is the case when the subject is turned into money and is mixed and confounded in a general mass of the same description; that the question was one of fact and not of law; and the dictum that money had no earmark must be understood in the same way, *i.e.*, as predicated only of an undivided and undistinguishable mass of current money. The right to follow did not depend upon the question whether the transformation was in pursuance of the trust and not in breach of it, but whether it could be shown "that they are so, where the thing can be discovered."

This principle of identity even in regard to money, without reference to the doctrine stated in general terms that money has no earmark, is explained by a citation from the judgment of Burnett J. in *Ryall* v. *Rolle*,[8] where in referring to *Whitecomb* v. *Jacob*[1] the learned Judge said: "Suppose goods are consigned to a factor who sells them, and breaks, the merchant for the money must come in as a creditor under the commission. . . . Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money, it will be for the use of the merchant. Or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it will be to the merchant's use. This was determined in *Salmon* v. *Scott*.[9]" The sole principle in "following" is that "he has repossessed himself of that of which . . . he never ceased to be the lawful proprietor." To the same effect is the case of Ex parte *Dumas*[10] where the Lord Chancellor Lord Hardwicke gave an order for tracing only in respect of the bills that remained *in*

1. (1710) 1 Salk. 160: 91 E. R. 149.
8. (1749) 1 Atk. 172: 26 E. R. 112. 9. (1742) Hil. 16 G. 2.
10. (1754) 1 Atk. 232: 26 E. R. 149.

specie and refused it in respect of those collected and mixed with the general assets.

At this point again, in regard to the true limits of following money, it may be useful to refer to the case of *Chedworth* v. *Edwards*,[11] where Lord Chancellor Lord Eldon, in a case where an injunction was asked for against a steward, restraining dealing with stocks and money at bankers, proved by evidence to be the produce of his master's property, in granting injunction in respect of stocks refused it in respect of the money at the bank and stated that the last payment was made about two years ago and it was too much to infer that it was the same money unconverted.

Thus the right to follow whether goods and chattels or money depends solely upon the proof of identity as a question of fact, and it ends "where the means of ascertainment fail". It is founded upon title, the right to the thing, not upon the question whether the transformation is in pursuance of the trust or against it as a breach thereof, but whether the beneficiary can point his finger to the thing and say "it is mine". In cases in which the rights of third parties do not intervene and the "following" is against the trustee, it matters not whether the transaction was in pursuance of the trust or in breach of it; for in the latter case it is open to the beneficiary to waive the tort, confirm the act and claim it as trust property. But where the property has passed into the hands of a third person the question whether the act of the trustee is in pursuance of the trust or in breach of it has a material bearing. If it is in pursuance of the trust the title to the thing passes to the third person and the beneficiary cannot any longer claim that thing as his. He will only be entitled to the proceeds of such transformation in substitution of the trust property. But where the act is a breach of trust it is open to the beneficiary to aver the breach itself, deny the passing of title to the third party, put forward his own consequent title to that property in the third party's hands and follow it. Herein comes the relevancy of averring a breach of trust. The breach of trust is not the foundation of the claim, the claim is founded on the title, which the breach of trust shows still inheres in the beneficiary. This is what is alluded to by Jessel M.R. and Thesiger L.J. in In re *Hallett's Estate*.[12]

The next case is that of *Pennell* v. *Deffell*.[13] It is always cited as the leading case on the subject. This case deserves close

11. (1802) 8 Ves. Jun. 47: 32 E. R 268.
12. (1880) 13 Ch. D. 696 at 709 and 723.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.

scrutiny for the reason that more is sought to be deduced from it than the learned Judges ever decided. On the facts of the case, it was by no means a startling decision, though the Court overruled the conclusion arrived at by the Master of the Rolls. The decision itself is merely a simple illustration of the application of the principle that money has no earmark; in the sense that it is not traceable where it has passed into currency, with the consequential exception that where it could be shown to exist in a mixed mass, even money could be traced. In that case, one Mr. Green was an Official Assignee in Bankruptcy. He received moneys of bankrupts' estates and put them in an account in his own name in the bank. On his death, there was a contest as between his successor in office, Mr. Pennell, and the administrator of his estate. Inquiries were directed as to the extent to which the moneys in the bank represented trust moneys or private moneys of Mr. Green. The Master of the Rolls, who heard exceptions to the Master's Report, took the view that the entire amount in the bank should go to the administrator, upon the ground of the supposed impossibility of ascertaining what portion of the balance at the bank belonged to the trust. There was no question that if it could be ascertained, the trust would attach to it. But the question was if it could be ascertained, the position that the subject-matter of the trust must in some manner be ascertained being the basis. On appeal from the Master of the Rolls, the Court held that the trust moneys stood well ascertained in the mixed moneys in the bank, which Mr. Pennell on behalf of the bankrupts' estates could follow. That was all. Mr. Green instead of putting trust moneys into a box, put it into the bank, and added some more of his private moneys to it. If Mr. Green got an equivalent amount in cash from the bank, cannot the bankrupts' estates lay hands on that sum for their quota? Put in this form, the answer is obvious; and that was the decision in the case. Knight Bruce L. J. says: "When a trustee pays trust moneys into a bank to his credit the account being a simple account with himself, not marked or distinguished in any other manner, the debt thus constituted from the bank to him is one which, as long as it remains due, belongs specifically to the trust as such and as effectually as the money so paid would have done, had it specifically been placed by the trustee in a particular repository and so remained: that is to say, if the specific debt shall be claimed on behalf of the *cestuis que trustent,* it must be deemed specifically theirs, as between the trustee and his executors and the general creditors after his death on one hand and the trust on the other."

It is to this same conclusion that Turner L.J. comes, but by different analogical reasoning. He begins by stating that all trust property, however much it may be changed or altered in its nature or character, and all the fruits of such property whether in its original or altered state, continue to be subject to or affected by the trust, and assures us that the Master of the Rolls did not in any degree dissent from that principle. What does this mean? The Master of the Rolls thought that being money, not kept apart, but mixed with other moneys, it necessarily lost its identity and became impossible of identification. The learned Judge points out that that is not correct and states that it is a question of fact whether it could be identified. If it could be, the right exists. Then the learned Judge proceeds to illustrate the position, but unfortunately takes up a complicated illustration which has led to much misunderstanding. It is clear that he did not intend to convey more than what the illustration of the repository and chest of Knight Bruce L.J. conveyed, with the addition of the trust money earning fruits in the meantime, nor was there any occasion or necessity to carry the principle of law beyond what that illustration would carry it to. He takes the illustration of the continuance of a partnership after the death of one of the partners with the concurrence of the executor and the right of the beneficiary to share in the ultimate general assets. This illustration is understood as if it stated that where a trustee in breach of trust merely puts in money in a business, but not as capital, the general assets are traceable for the invested amount. The learned Judge, however, laid down no such proposition. It was not the case of any sum being put into business and getting mingled with the assets. But it was a case of a continuance in business of the original ramified assets which constituted the capital, so that they got into further ramifications. It was simply a case of a few changes in the original form growing into more and further changes. This is brought out by the learned Judge himself when he says that the capital itself consisted only of the stock-in-trade; and if we conceive that in each such item of the stock-in-trade, the beneficiary had, upon the death of the ancestor and at the moment of the continuance of the business by the executor, a share which could be identified, when each such item further got transformed the same identity persists in the transformed material. And as the beneficiary had an identifiable interest in each item of the assets, if we realise that the ultimate assets are only each of these assets further metamorphosed, that identifiable interest of the beneficiary is identifiable in and is traced in fact to such ultimate assets. The

distinction is that it is not the case of a sum of money distinct from the existing assets, that is put into the business, but the beneficiary's share in each of the existing assets. The learned Judge cites it as an illustration of the subsistence of continued identity, not as a case where the right to trace results when there is a break in continued identity. He emphasises the necessity for ascertainment of the subject-matter of the trust, and refers to the decision of the Master of the Rolls, as based on the supposed impossibility of ascertainment, and says, "Here is an illustration where the ascertainment is possible," and proceeds to state that there is "a continuous substratum," *viz.*, the ascertained amount of the deceased partner's share. The learned Judge cannot by any means be understood as having extended the doctrine beyond what has been laid down by Burnett J. in *Ryall* v. *Rolle*[8] on the authority of *Whitecomb* v. *Jacob*,[1] where the learned Judge said, "Suppose goods were consigned to a factor who sells them and breaks, the merchant for the money must come in as a creditor under the commission," which was understood by Lee C. J. in the same case, as enunciating the position that things arising from the sale of other things follow the nature of the goods themselves only when the thing can be discovered. Nor can Turner L.J. be understood as giving a right to trace beyond the extent resulting from the illustration of the chest, or to give it in a case in which Lord Eldon refused to grant an injunction on the ground that the money which was put into the bank two years before, may not be identifiably there.

In fact, though the learned Judge had taken up the illustration of a partnership and sought to establish the analogy between the case before him and his illustration by stating that there was the substratum of the partner's share in the latter case which corresponded to the amount of trust moneys put into the banking business in the former—he does not seem to feel satisfied that the illustration he had taken was an apt one. He says: "It may be said that in the case to which I have referred there are rules and principles by which this Court is guided in determining what belongs to the estates of deceased partners . . . But before we part with the question upon that ground . .," and so saying the learned Judge begins to take up other familiar illustrations.

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1. (1710) 1 Salk. 160 · 91 E. R. 149.
8. (1749) 1 Atk. 172 : 26 E. R. 112.

Now the case of *The Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] justifies the mental reservation that Turner L.J. had in citing the illustration he took as an apt or perfect one or as founded upon principles identical with those which should govern the decision in *Pennell* v. *Deffell*.[13] In that case, trustees of two independent trust funds, the Trinity Hospital and the Alexander Trust, mixed them together and dealt with the mixed mass as a single fund. They purchased estates therewith, which rose in value, and invested in bonds which depreciated. The conflict was between the two trusts, the Trinity Hospital claiming the profitable estate and seeking to allocate the losing investment in bonds to the Alexander Trust. The ultimate decision was that the profit and loss should be pooled together and the two estates should share *pro rata*, dependent on the proportions of their original capital funds which had been administered as a mixed fund. If there were no other facts, subject to such observations as one might make upon the breach of trust in mixing the funds together—which however was done *bona fide* —the most just way to deal with the question was to divide as the House of Lords divided. But the possibility of raising an argument in favour of the Trinity Hospital as against the Alexander Trust, arose by reason of the fact that the treasurer of the trusts in deliberate disobedience of the instructions of the trustees, paid for the purchase from the funds of the Trinity Hospital so identifiable at that time.

In dealing with this question, Lord Hatherley takes up the same illustration as Turner L.J. did in *Pennell* v. *Deffell*[13] and a consideration of Lord Hatherley's judgment will show the value and relevancy of that illustration. The illustration is strictly relevant to a case like the one before the House, of a competition between two different estates seeking distribution between themselves of the proceeds of a particular investment, rather than to the one which actually arose for decision in *Pennell* v. *Deffell*.[13] Lord Blackburn himself adverts to this when he says: "No doubt when the question has been whether those who represented the trust could claim property on the ground that it was procured by trust funds which they had a right to follow, the identity of the fund is all important. But such a case as the present as to an investment has never, that I can find, been raised. In *Pennell* v. *Deffell*[13] it might have been raised, but those entitled to the different estates . . . .

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13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.

14. (1879) 4 A. C. 823.

very sensibly settled the proportions . . . without going to law about it." Thus Lord Blackburn differentiates between the case of tracing, for which continued identity is all-important, and a case of a joint title to a common investment which was the case before the House, as distinguished from the point for decision in *Pennell* v. *Deffell.*[13] Now, if we find that for the decision of the case before the House, Lord Hatherley took up the same illustration as that which Turner L.J. took in *Pennell* v. *Deffell,*[13] it is obvious that the fears entertained by Turner L.J. later in his own judgment about the aptness of the illustration he took and whether that may not be governed by other rules and principles, cannot be said to be ill-grounded. On page 839 in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] Lord Hatherley, after discussing the history of the difficulties raised in determining the rights consequent upon the utilisation of a deceased partner's share in a continuing business, says: "The principle was that the trust money having been used in the partnership concern and profits having resulted from that use of trust money, no attempt should be made to separate all the different funds out of which the money might have been paid, but the share of profits on the trust money so used was to be ascertained according to the capital employed." Is this not a definite statement that the right of the *cestui que trust* to a share of the ultimate assets is not founded upon any principle of tracing, but upon other principles peculiar to the law of partnership, which Turner L.J. himself suspected might well be?

So much about the decision in *Pennell* v. *Deffell.*[13] But two observations made in the course of the judgment, not covered, however, by the point decided, throw light on the principles of tracing beyond those actually established by the decision. Both the learned Judges point to the fact that the case before them was not complicated by any question of "order and disposition" or reputed ownership; and it was also stated by Knight Bruce L. J. "Whether the deposit in a bank by Mr. Green is a breach of trust, is a different question."

As regards the first observation, the suggestion seems to be that if Mr. Green had become bankrupt, different considerations might have arisen dependent on the question of reputed ownership. If Mr. Green could deal with the money as his own, being himself merely in debt to the trust estates, the trust estates would only be creditor against Mr. Green and have no

13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
14. (1879) 4 A. C. 823.

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claim for a charge on the bank balance. Subsisting identity will not avail.

As regards the second observation, it would have relevancy only on the supposition of the bankruptcy of the bank. In that event, if the investment by Mr. Green were authorised, the trust estates would be bound to reduce their own claim to the extent of the dividend received. On the other hand, if the investment by Mr. Green into the bank was a breach of trust it would be open to the trust estates to waive the breach and take the fund in the bank (if the latter were solvent) or in the alternative to aver the breach, disclaim the fund in the bank, and proceed for conversion against Mr. Green.

The next case of importance is *Frith* v. *Cartland*.[15] It is significant to note how Sir Page Wood, Vice-Chancellor, understood the limitations of the decision in *Pennell* v. *Deffell*.[13] The Vice-Chancellor begins his judgment by saying: "*Pennell* v. *Deffell*[13] is a very instructive case . . . It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines . . . The guiding principle is that a trustee cannot assert a title of his own to the trust property. If he destroys a fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that if a man mixed trust funds with his own the whole will be treated as trust property except so far as he may be able to distinguish what is his own . . . The sole question in every case is whether the property can or cannot be identified." The statement of the law in this form is conclusive to get rid of the notion that proof of an initial blending is all that is necessary to enable the *cestui que trust* to lay hold on the ultimate assets without proving the identity in the intermediate stages. The statement by Sir Page Wood that if the trustee dissipates the trust fund, there remains nothing to be the subject of a trust, gives the key to the interpretation. It follows as a corollary to the necessity of proof of continued identity, and conversely emphasises the rule that where the means of ascertainment stop tracing stops. This is further illustrated by Sir Page Wood, where in explaining the actual decision in *Pennell* v. *Deffell*[13] he says: "In *Pennell* v. *Deffell*[13] part of the trust fund had been paid into a bank, but it was not earmarked and was wiped out by subsequent drawings;

13. (1853) 4 De G. M. & G. 372: 43 E. R. 551.
15. (1865) 2 H. & M. 417: 71 E. R. 525.

and the whole ultimate balance—(which included moneys of Mr. Green's own, which he had put into the bank)—could not be fixed with the trust any more than a second £1,000 of stock which a trustee might happen to acquire after selling £1,000 of trust stock and spending the proceeds."

The next in the line of cases is Ex parte *Cooke*, In re *Strachan*.[16] The decision in this case merely follows that in *Taylor* v. *Plumer*,[6] and applies that decision to a case of money. In *Taylor* v. *Plumer*[6] the broker empowered to buy exchequer bills, purchased American stock and bullion with a view to abscond with them. The broker in Ex parte *Cooke*,[16] who was directed by the trustee to sell consols and purchase railway stock, got the cash on sale, engaged for the purchase of railway stock for the settling day, but failed before that day. He had received the price by a cheque and had paid it into his account at the bankers. The trustee claimed so much of the balance at the bank as was attributable to the price of the consols.

Before the Registrar, who refused to make the order in the first instance, the argument turned on the question whether a stock broker was a trustee, and the conclusion was that he was a mere banker and no more. The Registrar distinguished the case of *Taylor* v. *Plumer*[6] on the ground that "the stock broker went away with actual property in his possession, which was the property of his client." The Court of Appeal reversed the decision of the Registrar. The argument before the Court of Appeal emphasised that the price of the consols was trust money and the broker had notice of it. James L. J. took the view that the trust proceeds could not be made the broker's own for him to deal with by any bargain between the trustee and him, that the loan, if at all, was a breach of trust, and the money could be followed into the broker's hands. He added that even if there had been no trust, *Taylor* v. *Plumer*[6] governed the case. Baggallay J. A., though he expressed himself impressed by the decision in *Taylor* v. *Plumer*,[6] relied upon the original trust character of the money, which it retained in the broker's bank account, and observed "if it can be traced, it can be followed. There may be difficulty in tracing it but that does not affect the principle." Bramwell J. A., concurring on the point of view that it was trust money in the bank, explained the distinction which the Registrar made of the case of *Taylor* v. *Plumer*.[6] He said that the American bonds in *Taylor* v. *Plumer*[6] were not the property of the client by reason of his having ordered them

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6. (1815) 3 M. & S. 562: 105 E. R. 721. 16. (1876) 4 Ch. D. 123.

to be purchased, but because they were purchased with his money, and that necessarily involved the conclusion that if the broker had been caught with the money upon him, the client could have claimed it, and that the broker occupied a fiduciary position. The learned Judge continued, "A difficulty in tracing money often arises from the circumstance that payments now are not usually made in gold, but by cheques which go into a banking account, so that the sum is mixed up with the other moneys of the customer . . . The use of cheques may make difficulties in tracing money, but that, so far as it can be traced, it may be claimed as the property of the client. . ."

This case thus reaffirms the proposition that money can be traced as much as chattels, and that the principle in both cases is the same, *viz.*, the title of the owner. The limits to tracing are also the same, *viz.*, identification; and the usual system of banking transactions may make tracing difficult, but that does not excuse the necessity to prove the identity. Another proposition is that if a valid bargain could be entered into between the trustee and the broker, so as to make the transaction one of loan to the broker, or if there were any other rules of trade or custom which enabled the broker to handle the money as if it were his own, there would be an end to tracing.

Next comes the case of In re *West of England and South Wales District Bank,* Ex parte *Dale and Co.*[17] After the apology for his observation in In re *West of England and South Wales District Bank,* Ex parte *Dale & Co.*[17] regarding *Pennell* v. *Deffell*[13] and its reconciliation with the earlier authorities, which Fry J. makes at the end of his judgment on page 703 upon Mrs. Cotterill's claim in In re *Hallett's Estate,*[12] this decision may not have much value. But the ground upon which Fry J. was evidently guided to his conclusion, and which Mr. Justice Vaughan Williams puts forward as justifying the judgment itself in his valuable book on Bankruptcy Practice, (*see* under S. 38), exemplifies one of the principles in the law of tracing. In In re *West of England and South Wales District Bank,* Ex parte *Dale and Co.,*[17] a banking company were employed by Dale & Co. as agents to collect money and remit. They received the cash, placed it with the other cash with them and informed the employer that the money had been remitted, but went into liquidation before actual remittance. Fry J. held that the money became part of the general assets not traceable at the instance of the employer. The argument on behalf of Dale & Co. was

12. (1880) 13 Ch. D. 696.
13. (1853) 4 De G. M. & G. 372: 43 E. R. 551. 17. (1879) 11 Ch. D. 772.

that the money was never in the order and disposition of the bank and that the mingling with the general assets was a breach of trust, which was denied by the liquidators. Fry J. traces the history of the law from *Whitecomb* v. *Jacob*,[1] and understood *Taylor* v. *Plumer*[6] as stating that money may be treated as earmarked when it is physically separated from other moneys. He felt that the law should be different from what he thought the cases established, then referred to *Pennell* v. *Deffell*,[13] understood it to enunciate correctly the change in the law, but felt bound by the continuity of precedent to the contrary, which according to him was against his following *Pennell* v. *Deffell*.[13]

In the first place Fry J.'s understanding of *Taylor* v. *Plumer*[6] and the antecedent authority is not correct as admitted by him later in In re *Hallett's Estate*.[12] The proposition that money had no earmark, while it was at first understood to predicate the impossibility of tracing in respect of money, was later understood only as referring to its condition when it passed into currency, but that even there it could be followed where it could be separated and identified, even in a bank account. So understood, *Pennell* v. *Deffell*[13] did not enunciate any change in the law and that is exactly what Sir Page Wood in *Frith* v. *Cartland*[15] stated in terms: "*Pennell* v. *Deffell*[13] is a very instructive case, upon all questions of this kind. It does not indeed lay down any new principle, but it contains a particularly clear and able enunciation of established doctrines and their bearing upon circumstances of some difficulty. The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of a trust. But so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust. A second principle is that, if a man mixes trust funds with his own, the whole will be treated as the trust property, except so far as he may be able to distinguish what is his own." The justification, however, of Fry J.'s decision as pointed out by Justice Vaughan Williams is this: that the course of business was for the bank to place the actual moneys received with their own funds and remit the amounts by direction to a London bank who were common agents of themselves and their employers; the result of which was that the bank did nothing

1. (1710) 1 Salk 160: 91 E. R. 149.
6. (1815) 3 M. & S. 562: 105 E. R. 721 12 (1880) 13 Ch. D. 696 at 703.
13 (1853) 4 De G. M. & G 372: 43 E. R 551.
15. (1865) 2 H. & M. 417: 71 E. R. 525.

wrongful in mixing the moneys with their own. This would bring the case within the observations of James L.J. in Ex parte *Cooke,* In re *Strachan*[16] already referred to and those of Thesiger L.J. in In re *Hallett's Estate*[12] at the end of his judgment at page 723 *et seq.* In the words of Thesiger L. J. "Although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves, beyond the ordinary duty of a man to pay his debts." That Fry J. acted on the same assumption is clear from his own expressions in his judgment on the claim of Mrs. Cotterill in In re *Hallett's Estate,*[12] where referring to the authority to sell bonds given to an agent he speaks of it as an authority "which according to the proper interpretation to be put upon it by the course of dealing between them implied a right in him to mix the produce of the sale with his own moneys". He adds, referring to Ex parte *Dale & Co.*[17] that the factor properly converted the goods into money, that the money got properly mixed with his own money in accordance with the intention of the parties, and that in such a case the money could not be followed.

The case in In re *Hallett's Estate, Knatchbull* v. *Hallett, The claim of Mrs. Cotterill*[12] is a landmark in the history of the law of tracing. In that case a Mrs. Cotterill had some Russian bonds with Mr. Hallett, her solicitor, who was authorised to collect dividends thereon. Mr. Hallett "was bailee of the bonds and an agent to receive the dividend on the bonds". Mr. Hallett, before his death, improperly sold the bonds and put the money into his general account at the bankers. It was found as a fact that the money remained at his bankers mixed with his own money at the time of his death, *i.e.,* he had not drawn out that money from his banker. Thus, the proceeds of the Russian bonds stood identified with the funds in the bank. Upon these facts Mrs. Cotterill's claim was allowed by Fry J. and confirmed by the Court of Appeal. It is a significant fact that the trial judge was Fry J. who had decided Ex parte *Dale and Co.,*[17] but as stated already, he properly explained his position in coming to his conclusion in Ex parte *Dale and Co.*[17] Before the Court of Appeal, but for the observations of Fry J. in Ex parte *Dale and Co.*[17] there was not much point for discussion, and in view of Fry J.'s own statements in the matter under appeal, no further criticism of the judgment of Fry J.

12. (1880) 13 Ch. D. 696 at 707. 16. (1876) 4 Ch. D. 123.
17. (1879) 11 Ch. D. 772.

in Ex parte *Dale and Co.*[17] was called for. However, Jessel M.R. criticised Fry J.'s judgment *in extenso* and it is of value to us as a clear re-statement of the legal position. Jessel M.R. points out that in the early case of *Whitecomb* v. *Jacob*[1] and the early cases that followed it, the rule of equity was understood to be inflexible that money had no earmark. It was impossible to trace money as money. A change of view which began with *Taylor* v. *Plumer*[6] was re-stated in *Pennell* v. *Deffell*[13] and perfectly or imperfectly reiterated in *Frith* v. *Cartland*.[15] Any doubts on the matter were set at rest, and the proposition that money, if it could be identified, could be followed, was established by this decision. The decision also affirmed that the basis of tracing was founded upon title, and that the right to trace and follow was not confined to trusts and trustees in the strict sense, but to all persons standing in fiduciary relation. Thesiger L.J. also stated the exception to the rule in the form, "Although there may have been a trust with reference to the disposition of the particular chattel which those moneys subsequently represented, there was no trust, no duty in reference to the moneys themselves beyond the ordinary duty of a man to pay his debts; in other words, that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que trust*, or principal and agent."

The decision in the matter of other claims that arose in the administration of the same estate, established by a majority view amongst the Judges, that the rule in *Clayton's case*[17-a] in regard to the order of appropriation of drawings against payments in serial order, was no longer applicable as between the trustee and the *cestuis que trustent* as a class. (*See also* In re *Oatway*.[18]) For the application of the rule as between the beneficiaries themselves, *see* In re *Stenning, Wood* v. *Stenning*.[19]

Cases in the reports subsequent to 1879, apart from the refreshing decision in *Sinclair* v. *Brougham and another*,[20] illustrate different aspects in the law of tracing, flowing from the basic principles of "identity" and "title". First amongst them is the case of In re *Hallett & Co.*, Ex parte *Blane*[21] and the

1. (1710) 1 Salk 160: 91 E. R. 149.
6. (1815) 3 M. & S. 562: 105 E. R. 721.
13. (1853) 4 De G. M & G 372 : 43 E R. 551.
15. (1865) 2 H & M. 417: 71 E. R 525.
17. (1879) 11 Ch. D. 772.
17a. (1815) 1 Mer. 572: 35 E. R. 781.
18. (1903) 2 Ch. 356.
19. (1895) 2 Ch. 433
20. (1914) A. C. 398.
21. (1894) 2 Q. B. 237.

question arose in the bankruptcy of Hallett & Co. Blane and Hallett, trustees of a will, who held debentures in Hewitt & Co. which were being paid off, authorised Hallett & Co., in which the trustee Hallett was a partner, to collect the value of the debentures. There were other customers of Hallett & Co., who desired to invest in new debentures, and the result was that Hallett & Co. had to pay to Hewitt & Co. more money for the new debentures than they were entitled to receive from Hewitt & Co., for debentures paid off. The accounts were settled as between the two banks not by payment *in specie* but by a set-off in the books, Hallett & Co. paying the difference to Hewitt & Co. It also transpired that the new customers who invested in new debentures through Hallett & Co. did not themselves pay cash to Hallett & Co. who purchased new debentures in their customer's name merely on their credit. This fact appears from the concluding portion of the judgment of Davey L. J. though it is assumed in the judgment of Esher M. R. . Hallett & Co. suspended payment, and had an account with Cocks & Co. in which there continued to be to their credit an amount not below £4,000 from the date of their realisation of Blane's debentures up to the time of bankruptcy. Blane claimed a payment in full for the £1,600, the value of his debentures, that were paid off, from the amount in credit with Cocks & Co. to the exclusion of a large body of unsecured creditors. Vaughan Williams J. in the first instance made the order, and the reasoning of his judgment was this:

(1) The current account of Messrs. Hallett & Co. with Cocks & Co. became in credit £1,600 more than it could have been but for the payment off of these debentures. (This conclusion is stated on the assumption, that but for the payment off of these debentures, Hallett & Co. would have had to borrow from Cocks & Co. this £1,600 to pay Hewitt & Co. for the new debentures).

(2) From that time down to bankruptcy the current account with Cocks & Co. never went below £1,600. (The suggestion is that the trust fund stood undissipated.)

(3) If it was a case of the trustee Mr. Hallett paying the collections from debentures mixed with his own money, into the bank, Cocks & Co., In re *Hallett's Estate*[12] would apply.

(4) The fact being different, *viz.*, that the collection was made by Hallett & Co., bankers in which Hallett trustee, was only one of the partners, and that it was this bank which

12. (1880) 13 Ch. D. 696.

invested the money with Cocks & Co., Hallett & Co. received the amount of collections as bankers and not as agents, *i.e.,* as loan simply.

(5) As a loan to Hallett & Co. the amount got merged in the general assets, unless there is a breach of trust in the investment, and Hallett & Co. had notice of it.

(6) The placing of money in a bank by a trustee pending investment is ordinarily no breach of trust, but since Hallett a partner knew that his own bank was not solvent and nevertheless invested the money in it, there was a breach of trust.

(7) Hallett & Co. as bankers had through their partner Hallett, notice of breach of trust and therefore the money was traceable against them, and in respect of funds with Cocks & Co., on the assumption involved in the first point abovementioned. This judgment was reversed by the Court of Appeal, consisting of Esher M. R., Lopes L. J. and Davey L. J..

Esher M. R. held that the transaction in the first instance with Hallett & Co. was only one of loan; and said: "It is only fair to say that when Blane gave Hallett & Co. authority to receive this money they knew as a fact that he was a trustee; and although the result of the transaction was only to make them debtors to their customer, yet if the money, which was trust money, could be followed, and if it could be shown what was done with that actual money, the doctrine of following trust money would apply. But that is the difficulty in the case Can Colonel Blane, by virtue of the authority which he gave, shew that Hallett & Co. did actually receive the money, and further shew where it is now? Hallett & Co. did not in truth receive any money; they entered into a transaction with Hewitt & Co. the result of which was that no money passed; although in one sense Hewitt & Co. put Hallett & Co. in the position of being unable to say to Colonel Blane that they had not received the money, yet Hallett & Co. did not in fact receive any money, or tender of money or anything tangible which it would be possible to follow or to lay hands upon. Had there been anything in existence representing that which the bankers were authorised to collect, Colonel Blane might have followed it; but he cannot shew that; he can only show a transaction between Hallett & Co. and other persons. All that can be shown is a settlement of account, and a settlement of account cannot be followed." To the same effect is the judgment of Davey L. J. He says: "I have no doubt that, for the purpose of making them the debtors of Captain Blane's trustees, this money was received by Messrs. Hallett & Co.; but it was not received

by them in any sense which is material to the present purpose. Nothing was received by them *in specie,* notes, cheques, or coin; there was no credit existing *in specie,* nothing which the *cestui que trust* could follow and say that the property had been converted into." He puts the question "Was it lent to Cocks, Biddulph & Co. . . . It clearly never was." "The £1,600 was never paid into Cocks & Co. in any form, nor was it ever lent to them in any shape, nothing representing that £1,600 ever got into their possession on account of Hallett & Co., and the latter never got credit from the former for that sum in their account. Speaking for myself, it seems manifest that the account of Cocks, Biddulph & Co. was not increased by £1,600."

The judgment of the Court of Appeal thus emphasises what was overlooked by Vaughan Williams J. *viz.,* that the basis for tracing is the receipt by the trustee of something *in specie,* which can be traced through its transformations. The obligation to prove the continued identity of the thing follows as a necessary corollary. Blane's claim failed on both grounds. There was no receipt *in specie* of trust money by Hallett & Co., no augmentation of its assets thereby, nothing which entered into its future assets as a thing which you could lay your hands upon. Another ground is that no such trust fund got mixed up with the funds in Cocks & Co. so that the ultimate assets in the hands of Cocks & Co. cannot be said to have included any portion of the trust fund.

Assuming even that the transaction between Hallett & Co. and Hewitt & Co. was not a mere adjustment in books of account, but an actual transfer and retransfer of money *in specie,* the decision could not have been different. For one thing, the trust amount did not in fact swell the funds with Cocks & Co. and that is sufficient answer, when it is the assets with Cocks & Co. that are sought to be charged. For another, the position may be explained with reference to another principle, *viz.,* that the amount received from Hewitt & Co. in payment of the debenture was dissipated by Hallett & Co. in paying their own debts on behalf of other customers to Hewitt & Co. If the debenture money was received by them in cash, it only momentarily swelled their assets; the next moment, it was dissipated in payment of their own debt, and did not continue in their own assets. In this view, the inquiry would stop at a stage even before a determination of the character of Hallett & Co.'s fund with Cocks & Co.

Another interesting case is that of *James Roscoe* v. *Winder*[22] and it emphasises from another point of view the necessity for continued identity between the original trust fund and the fund in Court in respect of which the claim is made. In that case, the purchaser of a business covenanted with the seller to collect the book debts of the business as on a stated date and pay them to him. The purchaser did collect such debts to the value of about £455, paid the same into his general account at a bank, and drew upon it for his own purposes without making payment to the seller until it became depleted save for a sum of £25. Subsequent to such date, he put in moneys of his own into the same account and drew from the account with the result that on his death there was a credit balance of about £358. The seller claimed the bank balance in payment of the £455 due to him. The Court, Sargant J., held that he was entitled to no more than £25, the least intermediate balance, from out of the bank account.

The argument for the plaintiff was that "the banking account must be looked at as a whole, and the balance from time to time standing to the credit of the account is subject to one continual charge or trust." On the other side, it was contended that the money capable of being followed should be a specific sum forming the trust money or part of it, capable of being identified as such and reliance was placed on the observations of Davey L. J. in In re *Hallett & Co.*, Ex parte *Blane*[21] and of Wood V-C. in *Frith* v. *Cartland*.[15] It was submitted that the money paid into the bank after the trust money had been drawn out, was not paid in in execution of the trust and is not impressed with it. Upon these arguments of Sargant J. said at page 68: "You must, for the purpose of tracing, which was the process adopted in In re *Hallett's Estate*,[12] put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing, and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l*. 18*s*." The learned Judge added that no case decided that the trust was imposed upon any property into which the original fund could not be traced, and that if the money subsequently put into the accounts should be chargeable with the trust, there should be proof of sufficient indication of the intention on the part of the debtor to substitute those additional moneys for the original trust moneys and accordingly

12. (1880) 13 Ch. D. 696. 15 (1865) 2 H. & M. 417: 71 E. R. 525.
21. (1894) 2 Q. B. 237 at 244. 22. (1915) 1 Ch. 62.

"to impose by way of substitution the old trusts upon those additional moneys."

This last mentioned distinction is fully illustrated by the case of *Harris* v. *Truman*[23] affirmed in 9 Q. B. D. 264.

At first sight the decision seems somewhat startling and inexplicable. But a close examination of the facts not only justifies the decision but also emphasises the principle by illustrating the exception. In that case the defendant, a brewer, employed a malting agent and the course of business between them was for the malting agent to buy the necessary barley, give samples and accounts relating to purchases to the defendant who supplied the necessary moneys with reference to the accounts that the malting agents delivered from time to time. The malting agent, however, in fraud of the defendant whom he kept from the knowledge of actual events, used the cash supplied, and the barley purchased, for his own purposes and kept the defendant off any scent of suspicion by supplying the malt required by the defendant by purchasing barley or ready-made malt on credit from others. The malting agent subsequently absconded and was adjudicated bankrupt and there was at the time in his premises barley to the value of £22,000 and malt for £35,000, the value of both together exceeding the amount of defendant's money paid up to then, money which was ostensibly supplied for the purchase of barley but which had been misappropriated by the malting agent. The defendant claimed as against the plaintiff, the assignee in bankruptcy, to retain the malt and the barley found on the premises which the defendant had taken possession of, against the amounts owing to him.

On these facts it was found first, that the moneys advanced by the defendant for the purchase of barley were impressed with a trust, and, secondly, that the stock on the premises was either the product of trust moneys or in substitution of the barley, in payment for which the malting agent ought to have applied such trust moneys. An argument founded upon reputed ownership was also negatived, "it being notorious that malting agents are not usually the owners of the barley and the malt at their maltings." On these findings the defendant's claim was upheld, and the key to the decision lies in the findings of fact on page 352 of 7 Q.B.D. Field J. says, "It therefore seems to follow that when, in order to have barley on his premises to malt sufficient in quantity, to represent that, for the purchase of which he ought to have applied the money which he had fraudulently devoted

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23. (1881) 7 Q. B. D 340.

to other purposes, he bought and brought on to the malting and proceeded to convert into malt barley otherwise bought, it is an irresistible presumption that he did so with the object and intention of malting that barley and supplying it as malt to the defendants, and of representing to them (as he in fact did at the end of every season, and in effect whenever upon their visits of inspection they saw barley on the premises) that the barley thus bought was bought for the benefit and purposes of the defendants in lieu of that which he ought to have applied their money to the payment of, and that he thus intentionally and irrevocably declared, as it seems to me, that he held that substituted barley upon the original trust with which the defendants' advances were impressed, and upon which he would have held barley bought with their money." To the same effect is the observation of Bowen J. on page 361. "It appears to me that both parties meant that the specific barley purchased by the bankrupt and brought upon his premises should be appropriated to the purposes of the malting." Thus whatever other grounds there may be leading to the conclusion, it is amply justified by the facts above stated and in this view the decision illustrates the exception enunciated in *James Roscoe* v. *Winder*.[22] Thus tracing requires the continued existence of the original thing identifiable as such or something that had taken its place in substitution thereof.

We now come to the authoritative decision of the House of Lords in *Sinclair* v. *Brougham and another*[20] which clarifies the fundamental principles on which the law of tracing is based. The case itself is more often referred to on the question of the *ultra vires* character of acts beyond statutory powers, and as an exposition of the basic principles of the action of "money had and received"; but none the less it is an authoritative exposition of the principles of tracing.

In that case, a Building Society acting *ultra vires* of its powers as a Society and not merely of the powers of the directors, received deposits from depositors and was wound up. Questions arose as to the order of distribution of the available funds as among (1) the outside creditors of the society, *i.e.*, not being depositors, (2) the shareholders, and (3) depositors whose deposits had been accepted by the Society *ultra vires* of its powers. Eventually the contest reduced itself to one of claim for priority by a set of shareholders over the depositors. At the arguments before the House of Lords, on the suggestion of

20. (1914) A. C. 398.

22. (1915) 1 Ch. 62.

the Lord Chancellor about the applicability of In re *Hallett's Estate*,[12] Kay K.C. for the depositors, relied also upon 'tracing' as one of his grounds. The arguments in reply thereto of Upjohn K.C. are very interesting. He first said that an *ultra vires* contract of loan is void and gives rise to no debt, save where the money paid is applied to the discharge of the lawful obligations of the Society so as to that extent not to increase the pecuniary obligations of the Society; that money paid under an *ultra vires* contract does not become the property of the Society but remains that of the payer, and so long as he can identify it he can trace it to any number of changes and claim on the footing that it is and always has been his property, the burden, of course, of proving the identity being on the person who alleges it, that in this view the claim is put on "property," and there can be no right of property without identification; that apart from a tracing order proper, *i.e.*, an order enabling an individual depositor to trace his deposit into some asset of the Society, no claim can be made on the ground of property and that tracing cannot exist as a matter of speculation. He added that a claim for tracing was inconsistent with the admissions made on behalf of the depositor, whereby outside creditors were given priority which they could not have had if a tracing order could be made, and that the principles of tracing were applicable only on the footing of fiduciary relationship which it was confusion to adopt, to a case of common law liability arising from a tort.

Dealing with this position, the Lord Chancellor says (p. 418): "The depositors . . . will not succeed unless they are able to trace their money into the hands of the society . . . as actually existing assets . . . Their claim cannot be *in personam* and must be *in rem*, a claim to follow and recover property with which in equity at all events they had never really parted." Then the learned Lord proceeds to lay down the history of the law of tracing in the case of money. He says: "In most cases money cannot be followed," owing to the difficulty of establishing a title *in rem*. If money passes into currency, according to law not only possession but property passes. But this "exception to the general requirement of the law as to title" is not extended "beyond the limits which necessity imposes". So where money is kept in a bag and stolen in that form, or money is used by a wrongful taker to purchase a parti-

12. (1880) 13 Ch. D. 696.

cular asset, that asset, if it can be identified as purchased with the money, can be traced. Lord Ellenborough applied this principle to the case of a broker who wrongfully invested money of his principal in purchasing securities. The reason for the rule is that the wrongful taker cannot as against his principal plead that his possession is property. But according to Lord Ellenborough, this rule again, is limited, for, if the agent paid the money not in purchasing an asset but into his general account with the banker, the money passed into currency and there was an end to tracing because a debtor and creditor relationship had arisen between the agent and his bank and that precludes the notion of following the money. The learned Judge says that to this extent the doctrine of common law also went, the limit being "so long as the relation of debtor and creditor has not superseded the right *in rem.*" Then the learned Lord refers to the case of Ex parte *Cooke*[16] explaining *Taylor* v *Plumer*[6], and the observations of Thesiger L. J. in In re *Hallett's Estate*[12] who speaks of the existence of a fiduciary character so as not to create a relationship of debtor and creditor and says: "It is, in my opinion, impossible to confine the right at law to follow to cases where there was a fiduciary relationship. The principle appears to me to cover all cases where the property in the money has not passed and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. A person standing in a fiduciary relation may be in this position, but it is not because of the trust or fiduciary duty. The common law which we are now considering did not take cognizance of such duties. It looked simply to the question whether the property had passed and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed." Thus far, the learned Lord says, the common law went, but equity, which exercised a concurrent jurisdiction based on trust gave a further remedy. "The Court of Chancery could and did declare even against the general creditors of the wrong-doer that there was what it called a charge on the banker's debt to the person whose money had been paid into the latter's bank account in favour of the person whose money it really was." Jessel M.R. in In re *Hallett's Estate*[12] applied this equity not merely to cases of trust but to all cases of fiduciary relationship where money was held to belong in equity to the plaintiff. A charge was declared "on the investment in a debt due from bankers on balance or on any

6. (1815) 3 M. & S. 562: 105 E. R. 721. 12. (1880) 13 Ch. D. 696 at 723.
16. (1876) 4 Ch. D. 123.

mass of money or securities with which the plaintiff's moneys have been mixed." The learned Lord then asks that if that was the principle, why it should not apply to a case of *ultra vires* contract where the property was never converted into a debt, in equity at all events, and there had been throughout a resulting trust, though not of an active character.

The process of reasoning is this: It was *ultra vires* of the Society to borrow, *i.e.,* to undertake to repay the money. But when the depositors paid in moneys, it was in consideration of the undertaking by the Society to repay the amount, that they allowed their money to be used by the Society as its own. This consideration failed with the result that the depositors had paid, and the Society had received, moneys without any consideration moving from the one to the other—with the consequence that the depositors had the right to follow the money into the assets into which the moneys had been invested.

Thus far about the enunciation of the principles of the law of tracing. If in truth the basic principle of tracing is founded upon title, upon property, there is no reason to confine it either to trusts or even fiduciary relationships. It ought properly to apply where one man has the property of another in a position that the title of the owner subsists and the other acquires no property in it.

Having dealt with the facts of the case and the principles of tracing as enunciated by the Lord Chancellor, it would be interesting to discuss the actual decision in the case and the principles upon which it was founded.

To recapitulate, there were three sets of competing claimants: (1) the outside creditors, (2) the depositors, and (3) the shareholders. The outside creditors had been paid in full and no question arose about the validity of that payment—a fact which enabled Upjohn K.C. to contend that if the strict principles of tracing could be applied to the case of the depositors, it would necessitate the re-opening of the payment to the outside creditors. As regards the depositors, upon the principles of tracing enunciated at length, they would be entitled to trace for their deposits, though there was no question of a fiduciary relationship between the depositor and the Society. Then there is the claim of the shareholders. But they paid money and got full consideration for it in the shares issued to them. The money therefore became the money of the Society. Any claim to the existing assets could therefore be made only by the Society and not by the shareholders.

Thus, the depositors on the one side and the Society on the other, have rights to follow in respect of the fund in the hands of the liquidator; and the question arises whether the principle of *Hallett's case*[12] can be applied. Are the depositors and the Society in the same relation to each other as the principal and agent stood in *Hallett's case*[12]? They are not. The principal in *Hallett's case*[12] had the remedy, *viz.*, to aver the breach against the agent, who cannot set up his own misconduct to gain an advantage for himself or his general creditors as against his principal by pleading his own breach of trust. The depositors in *Sinclair* v. *Brougham*[20] had no such alternative right "to disaffirm the transaction to the extent of claiming on the footing that their money has been applied in breach of trust". They can only "adopt the dealings with the money they had handed over under circumstances in which it never really ceased to be theirs, and claim the part of the mass of general assets which represents it as belonging to them in equity". There was no breach of fiduciary duty on the part of the Society, and that distinguishes the case of In re *Hallett's Estate.*[12] There is no question of the Society being disabled by the existence of fiduciary obligations from putting forward its own claim. The agents of the Society acted *ultra vires* in the application not only of the depositors' but of the Society's own money and it is in the case of the Society, as in that of the depositors, a question only of a right to follow. "It arises between persons each of whom claims that . . . certain moneys were his and never ceased to be his, and are now represented by specific assets." The depositors therefore can only claim on a principle of apportionment of the depreciated assets, and specific tracing is not possible. The actual decision therefore is not one illustrating the principles of strict tracing.

It is significant to note that it was admitted that the funds in Court being far larger than the amount of the contributions by the shareholders, embraced the moneys of the depositors. It is also useful, in understanding the principles of tracing, to remember that when we talk of a charge on a mixed bank debt it is only "to express compendiously but somewhat loosely that the indebtedness was for a single sum of which the amount of the principal's money was an integral part, and that the agent could not draw on account of the single sum in which he had improperly mixed his own funds with the money of his principal, until he had made good the amount of his money."

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12. (1880) 13 Ch. D. 696.

20. (1914) A C 398.

The judgment of Lord Dunedin is instructive. He refers to the arguments against the rights of depositors in these words: "The only right of the depositors is a right to vindicate property; or in other words when you have a *jus in re* you can enforce it; but if the thing has so disappeared that a *jus in re* is no longer to be found (and this must practically be so in the case of money), then your remedy is gone." In another place he says, "You cannot have a *jus in re* in currency," and at yet another, "All that is left to it (the common law) is to vindicate *in forma specifica* and its forms of action fail when the thing can no longer be identified." Then the learned Lord criticises the argument in that "it lies in the idea that the *jus in re* represents the depositor's only right: that there can be no obligation on the other side at all," and solves the problem thus: "Equity—I am now speaking of technical equity—has already found itself able, in the exercise of its auxiliary jurisdiction, as the respondents admit, to deal with the situation when the money has gone to pay a just debt. Is its action limited to that situation? I think not. I think it can always in the exercise of the same jurisdiction help the common law by tracing and can say that if the proceeds can be shown to be what I have called a superfluity in the person of the recipient, then it will hold that that property is traced just as surely as if it was still in the original form." In such a case the defendant does not "pay as a debt the equivalent of what he originally got," but merely surrenders "what he still has as a superfluity, an enrichment, which, but for the original reception of the money, he would have been without." The learned Lord proceeds, "it, therefore, in each case becomes a question of evidence. Now, that the Society, in the present case, has got a superfluity, is obvious," and later adds, "In my judgment, they (the outside creditors) were rightly paid . . . and had they not been, they would stand . . . as first in the ranking," a statement, which shows that the learned Lord was not enunciating the law of strict tracing.

That the decision in *Sinclair* v. *Brougham*[20] is not founded on principles of strict tracing is also explained both by Lord Parker and by Lord Sumner. After explaining that on the principles of In re *Hallett's Estate*[12] one would be entitled "to follow the money as long as it, or any property acquired by its means, could be identified," Lord Parker proceeds, "Here is a mass of assets arising in the course of an *ultra vires* business

12 (1880) 13 Ch D. 696.

20. (1914) A. C. 398.

carried on by the directors and agents of the Society . . . What is left may be taken to represent in part the moneys of the *ultra vires* lenders and in part the moneys of the Society wrongfully employed in the business. The equities of the *ultra vires* lenders and of the Society are equal." Lord Sumner says: "What ought to be done, I think, is clear; the only difficulty is how to describe the principle and how to affiliate it to other legal or equitable rules. The question is one of administration . . . In my opinion, if precedent fails the most just distribution of the whole must be directed, so that no recognised rule of law or equity be disregarded. In this case, neither the shareholders nor the depositors have the better equity . . . The claims of each class are equal and, I think, for the purpose identical . . . The principle on which *Hallett's case*[12] is founded, justifies an order allowing the appellants to follow the assets not merely to the verge of actual identification, but even somewhat further in a case like the present where after a process of exclusion only two classes or groups of persons having equal claims are left in and all superior claims are eliminated. Tracing, in a sense, it is not, for we know that the money coming from *A* went into one security and that coming from *B* into another, and that the two securities did not probably depreciate exactly in the same percentage. . . . Still I think this well within the 'tracing' equity, and that among persons making up these two groups, the principle of rateable distribution of assets is sound."

It will be seen that from the foregoing discussion, the following conclusions emerge:—

(1) The right to trace is the right of property, it is founded on ownership, on title; it is a right *in rem,* not one *in personam*.

(2) As a corollary to the above, the subject-matter must be a *res* capable of being followed through and identified.

(3) Early decisions applied the doctrine first to trustees only and then to all cases of fiduciary relationship; but *Sinclair* v. *Brougham*[20] has shown that if the doctrine is founded upon title, *i.e.*, upon property, it would equally apply to all cases where the property of one is found in the possession of another without the former losing title and the latter acquiring it: cases which would give rise to a kind of resulting trust, though not of an active character.

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(4) Where the tracing order is asked against a trustee (the word "trustee" being used in a wide sense to cover all cases of fiduciary relationship) the order follows, whether the act as the result of which the transformation of the subject-matter takes place, is an authorised act or is a breach of trust; for in the latter case the beneficiary has the option to waive the wrong and claim the property.

(5) Where the tracing order is sought against a third party, the act by which the property passes into the hands of such third party must be a breach of trust; for otherwise a valid title would have passed to such third party and there could be no tracing founded on the beneficiary's title to such property in his hands.

(6) Tracing was first applied only to goods and chattels, and was held inapplicable to the case of money, on the supposed impossibility of tracing it, because "money has no earmark".

(7) Later, it was extended to cases where the money is found to have been invested in lands and the Statute of Frauds was got over by the application of the principle of resulting trust.

(8) Later still, tracing was allowed in the case of money up to the limit where it was identified to exist in a mass mixed with other moneys; the principle that money has no earmark being limited to refer to the passing of money in currency, wherein property passes with possession.

(9) The tracing of money, in the absence of an identifiable *jus in re* where it passes into currency, is an extended jurisdiction of equity which holds property traced, where there is a superfluity in the hands of the recipient, an enrichment which, but for the original reception of the money, he would have been without. This is the utmost limit to which tracing can go according to Lord Dunedin.

(10) When we speak of a charge for trust moneys on a mixed fund, it is a loose use of that expression and we merely contemplate the mixed sum as a single sum of which the beneficiary's money forms an integral part and that the trustees cannot draw on account of the single sum in which he has improperly mixed his own funds with the money of the beneficiary, until he has made good the amount of the beneficiary's money.

(11) As a proviso to (4) *supra,* where in the case of money, the relation between the claimant and the defendant be-

comes one of debtor and creditor, either because the defendant is authorised to make use of the money as freely as if it were his own, or, is intended so to do by contract, express or implied, or by custom, or usage, or course of dealing, there can be no tracing. In other words, to enable tracing into a mixed fund, the mixing up must have been wrongful.

(12) In all cases, proof of continued identity or presumed identity of the original property with the ultimate property which is claimed, is necessary and where the means of ascertainment fail, tracing fails.

(13) As a corollary to (2) and (12) *supra,* where no money is received by a trustee *in specie* there can be no tracing. A valid obligation as for a debt may arise, for example, by adjustment in accounts, but that will not give rise to a case for tracing.

(14) As another corollary to (12) *supra,* where money that comes into the hands of a trustee is dissipated by him the right to trace is *pro tanto* lost. The right to trace exists only against the least intermediate balance during the currency of the account.

(15) As a proviso to (14) *supra,* where the trustee substitutes other property in the place of the dissipated property, the trust, with the consequential right to trace to it, will attach to such property, but only in cases where the intention to make such substitution is clear.

(16) If a person, holding money in trust, mixes it with his own money and draws out a portion from the blended fund for his own use, he will be held to have drawn out his own money and not any portion of the trust money. The rule in *Clayton's case,*[17-a] setting drawings-out against payments-in, in the order of their sequence does not apply to this case, though it is applicable to a case where the mixed fund belongs to many beneficiaries, and a conflict among them *inter se* arises as to the character of the remaining funds.

(17) The illustration given by Turner L.J. of a continuance of a business by a surviving partner with the deceased partner's assets, belongs strictly to a different branch of law, as explained by Lord Hatherley in *Lord Provost etc. of Edinburgh* v. *Lord Advocate*[14] though it can be justified on principles of tracing as well.

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14. (1879) 4 A. C. 823.

17*a*. (1815) 1 Mer. 572: 35 E. R. 781.